No. 88-1787

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. HALL,

Petitioner,

v.

NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR., ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,

Respondents.

On Petition for a Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii

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BRIEF FOR RESPONDENTS HENRY E. HOWARD, EXIT COMPANY LIMITED PARTNERSHIP, BANCORP HAWAII SERVICE CORPORATION, AND BEL-CENTRE, INC. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Rule 38 of the Hawaii Rules of Appellate Procedure, which permits the award of attorney's fees and costs when the Court determines that an appeal is frivolous, is constitutionally valid.

2. Whether the Hawaii Intermediate Court of Appeals properly imposed sanctions after finding that an appeal was frivolous.

LIST OF PARTIES AND AFFILIATIONS

Respondents are in agreement with the List of Parties and Rule 28.1 List submitted by the Petitioner in his Petition for Writ of Certiorari.

The parties to the proceedings below were Petitioner ROBERT W. HALL and Respondents NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation.

BANCORP HAWAII SERVICE CORPORATION is affiliated with BANCORP HAWAII, INC. and its subsidiary BANK OF HAWAII, BEL-CENTRE, INC. is affiliated with BELMARIN INVESTMENTS N.V., a Netherlands Antilles company.

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BRIEF FOR RESPONDENTS HENRY E. HOWARD, EXIT COMPANY LIMITED PARTNERSHIP, BANCORP HAWAII SERVICE CORPORATION, AND BEL-CENTRE, INC. IN OPPOSITION

Respondents Henry E. Howard, Exit Company Limited Partnership, Bancorp Hawaii Service Corporation, and Bel-Centre, Ltd. respectfully pray that the Petition for a Writ of Certiorari of Robert W. Hall be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner's four-count amended complaint against Respondents sought damages for alleged coercion, defamation, and invasion of privacy. The Respondents filed a motion for summary judgment arguing, among other things, that there can be no "coercion" where a person requires a financial guarantee from a potential lessee, that there can be no defamation from the disclosure of documents that the Petitioner had previously used in court proceedings, and finally that there can be no constitutional invasion of privacy without "state action". The Hawaii trial court, finding no issue of material fact, granted summary judgment to the Respondents on all counts. Petitioner then filed an appeal.

In response to the Petitioner's opening brief, Respondents argued that Petitioner's appeal was frivolous and requested the award of their attorneys' fees and costs for defending the appeal. Petitioner did not respond to this argument in his reply brief.

The Hawaii Intermediate Courts of Appeals issued a Memorandum Opinion wherein it characterized the Petitioner's different arguments on appeal as "specious" and "wholly without merit." The Court disposed of many of Petitioner's claims by stating in a footnote that the assertions were "utterly devoid of merit and unworthy of discussion." The Court affirmed the trial court's granting of summary judgment to the Respondents and also ruled that the Petitioner's appeal was "frivolous." Pursuant to Rule 38 of the Hawaii Rules of Appellate Procedure, the Court awarded to Respondents their reasonable attorneys' fees and costs of $1,881.65 for defending the appeal. The Court also awarded the sum of $3,125.70 in costs and attorney's fees to another party having to defend against the Petitioner's appeal.

Petitioner filed a motion for reconsideration contesting the Court's decision, including the award of attorneys'

fees and costs. Petitioner's motion for reconsideration was denied.

Petitioner then filed in the Hawaii Supreme Court an Application for Writ of Certiorari, again arguing, among other things, that he should not have to pay Respondents' reasonable attorneys' fees and costs. The Hawaii Supreme Court denied the Petitioner's Application for Writ of Certiorari.

The present Petition for Writ of Certiorari in the Supreme Court of the United States followed. Respondents are again having to incur further attorneys' fees and costs in opposing the instant action.

SUMMARY OF ARGUMENT

The Hawaii Intermediate Court of Appeals ruled that the appeal taken by Petitioner was frivolous and manifestly without merit. Pursuant to Rule 38 of the Hawaii Rules of Appellate Procedure the Court awarded reasonable attorneys' fees and costs to the Respondents for having to defend against such an appeal.

There is no merit to the claims of Petitioner that Rule 38 and the action taken by the Hawaii Intermediate Court of Appeals was unconstitutional. Rule 38 of the Hawaii Rules of Appellate Procedure is very similar to Rule 38 of the Federal Rules of Appellate Procedure and Rule 49.2 of the Rules of the Supreme Court of the United States. Rule 38 is reasonably tailored to achieve the legitimate objective of discouraging frivolous appeals. The Hawaii Intermediate Court of Appeals decision to award reasonable attorneys' fees and costs was a proper exercise of the court's power to manage its own affairs. This Court should deny the instant Petition.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. RULE 38 OF THE HAWAII RULES OF APPELLATE PROCEDURE IS REASONABLY TAILORED TO ACHIEVE THE LEGITIMATE OBJECTIVES OF DISCOURAGING FRIVOLOUS APPEALS AND CONSERVING JUDICIAL RESOURCES.

Petitioner has asserted that the "essence" of his appeal is that the "Hawaii Supreme Court has adopted, and the Hawaii ICA has applied a patently unconstitutional court Rule 38, Hawaii Rules of Appellate Procedure."

Examination of Rule 38 of the Hawaii Rules of Appellate Procedure shows that it is very similar to Rule 38 of the Federal Rules of Appellate Procedure and Rule 49.2 of the Rules of the Supreme Court. All of these rules provide that an appeals court has the power to impose sanctions against a party who takes a frivolous appeal. There is nothing "patently" unconstitutional about the adoption of such rules. Petitioner does not and cannot identify anything about Rule 38 of the Hawaii Rules of Appellate Procedure that would render it unconstitutional. The Hawaii Appellate Courts have a legitimate interest in discouraging frivolous appeals and in conserving judicial resources. Rule 38 is carefully drafted to achieve this result. *See Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. ——, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (where the Court upheld a statute that assessed a 15% penalty against parties who appeal unsuccessfully from money judgments).

Though sanctions for a frivolous appeal should be invoked judiciously and with caution, there is no question that the courts have the power to impose sanctions. *See Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 73 L.Ed. 259 (1929); *Slaker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 73 L.Ed. 258 (1929); *Fluoro Electric Corp. v. Branford Assoc.*, 489 F.2d 320 (2d Cir. 1973); *Duns-*

combe v. Sayle, 340 F.2d 311 (5th Cir. 1965); Annot., 67 A.L.R. Fed. 319 (1980). This power comes from the control necessarily vested in courts to efficiently manage their own affairs. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh'g denied*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112 (where the Court upheld a dismissal with prejudice for failing to appear at a pretrial conference and failing to prosecute the case).

There is no support for Petitioner's claim that Rule 38 of the Hawaii Rules of Appellate Procedure is unconstitutional.

II. THE HAWAII INTERMEDIATE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND SANCTIONS AGAINST PETITIONER FOR FILING A FRIVOLOUS APPEAL.

Petitioner has made the statement that he was "bushwacked" and "blind-sided" and that he had no prior notice and no opportunity to address the issue of sanctions for filing a frivolous appeal. These statements are not accurate.

Respondents, in addressing the points made by the Petitioner in his appeal, clearly set forth in their answering brief that the appeal taken by the Petitioner was frivolous and Respondents requested their attorneys' fees and costs. Petitioner had the opportunity to respond directly to these charges in his reply brief but did not do so. Petitioner was given notice and did have an opportunity to respond to the request for sanctions.

Furthermore, even if the Petitioner had not received any prior notice, the Intermediate Court of Appeals could still have imposed sanctions against the Petitioner. In *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980), the Court of Appeals awarded damages and double costs for a frivolous appeal, even though no one requested such an

award and there was no hearing on the question of sanctions. The Seventh Circuit Court of Appeals, in exercising its inherent power, imposed sanctions on its own initiative, citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure Section 3984 at 465 (1977). The Court reasoned that though one of the parties to an appeal normally makes a request for its attorney's fees when an appeal is frivolous, the Court can, in egregious cases, impose sanctions on its own to deter frivolous appeals and preserve the court's calendar for cases worthy of consideration. 614 F.2d at 1132.

Similarly, in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh'g denied*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112, it was held that a trial court had the inherent power to dismiss a case with prejudice, without advance notice or a hearing. The Court in *Link* made it clear that the absence of notice or the failure to hold an adversary hearing did not render the trial court's dismissal of the case void. The adequacy of the notice and hearing provided to the parties turned upon the circumstances of the issue involved and the knowledge that the parties should have had of the possible consequences of their conduct. *Id.* at 632.

In the instant case, with or without a hearing, the Petitioner should have known that his appeal was without merit and that if he proceeded it would be at his own jeopardy. Though he claims that he is not a trained attorney, this was not his first experience with the Hawaii Courts and he should not be permitted to use his pro se status as a shield. He elected to proceed without an attorney and in so doing he took on the responsibilities that an attorney would otherwise have borne. *See Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir. 1974), *cert. denied*, 419 U.S. 870, 95 S.Ct. 128, 42 L.Ed.2d 108 (where pro se appellant should have understood that the refusal of attorneys to represent him was not a conspiracy but instead a recognition of the frivolity of his position); *Wood v. McEwen*, 644 F.2d 797

(9th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (where pro se appellant repeatedly raised the same claims and had become burdensome and costly to other parties). There was nothing that the Petitioner or any attorney in his place could have submitted at a hearing that would have affected the merits of this appeal. A formal hearing on the matter would only have resulted in a further waste of judicial resources. There was no denial of Petitioner's due process rights.

Finally, Petitioner has argued that he and other litigants are being denied free access to Hawaii's Appellate Courts by the imposition of sanctions for frivolous appeals. Petitioner does not cite any case on point and Petitioner's reasoning is too narrow. While freedom of access to the courts must indeed be protected, every misuse of judicial process is a misuse of the court's time and necessarily impinges upon the right of other litigants with valid claims. *See Ruderer v. Fines*, 614 F.2d 1128, 1133 (7th Cir. 1980). The major purpose of Rule 38 of the Hawaii Appellate Rules is to minimize the time devoted to the disposition of appeals that are plainly without merit. The instant case is a striking example of the immense amount of judicial resources that are wasted by a frivolous appeal. Sanctions imposed by the Intermediate Court of Appeals should deter further frivolous appeals and will permit the court to devote its limited time and resources to matters that deserve consideration.

Rule 38 of the Hawaii Rules of Appellate Procedure has a legitimate purpose and its careful use will result in greater and more efficient use of the appellate courts in Hawaii.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that certiorari be denied.

Respectfully submitted,

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